IN THE

SUPREME COURT OF THE UNITED STATES

No. 572

METROPOLIS THEATRE COMPANY,
a New York Corporation,

Petitioner,

vs.

L. H. BARKHAUSEN and RANDOLPH BOHRER,
etc., et al.,

Respondents.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF THE PETITION.

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PETITION FOR CERTIORARI.

Petitioner, Metropolis Theatre Company, a corporation, seeks this Court's writ of *certiorari* to review an affirmance by the Court of Appeals for the Seventh Circuit in the case of *Metropolis Theatre Company* v. *Barkhausen, et al.*, 170 F. 2d 481 (*Opinion*, Tr. 201-209, *judgment*, 210), of a judgment entered by the District Court for the Northern District of Illinois, Judge La Buy presiding. (*District Court judgment*, Tr. 175-177.) The District Court dismissed this suit for want of supposedly indispensable parties.

The Court of Appeals entered its judgment on November 11, 1948. Rehearing was denied on December 15, 1948.

Summary and Short Statement of the Matter Involved.

This case tenders the important question, delineated by the facts of this case, whether State or Federal law determines the indispensability of parties to a suit brought by petitioner for possession of its separately owned land and that part of a Chicago loop theatre and office building situated thereon, and for damages for occupation of petitioner's land and its part of the building by respondents, who petitioner says are trespassers.

Constitutional considerations and the construction of the Federal Rules Enabling Act of 1934[1] are involved. The moment of the question, which is *res nova* in this Court, is attested by a wealth of contemporary legal literature.[2]

The Court of Appeals, disregarding Illinois law relied upon by petitioner and citing and following its declaration in *De Korwin* v. *First National Bank,* 156 F. 2d. 858, that

> "indispensability must be determined by Federal rather than local rules",

held that the owners of the other portion of the building were indispensable parties, both as to so much of petitioner's suit as sought possession of petitioner's land and

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[1] U.S.C.A. Title 28, Sec. 723(b).

[2] For bibliography of contemporary law review articles on "Substance v. Procedure" in connection with the Rules of Federal Civil Procedure, see Fed. Rules Service (current material) page 491; see also discussion of Federal Enabling Act of 1934 as being a limitation on the new rules, in Cyc. of Fed. Procedure (1943) Vol. 3, Sec. 714, et seq.; see also (1948) 2nd Ed. of Moore Fed. Practice Vol. 2, page 30, which discusses "substantive rights" as used in the Enabling Act of 1934 Par. 4, et seq. We have found no article or text book which discusses Rule 19 (relating to indispensability of parties) in the light of (a) the 1934 Enabling Act provision which in effect makes all the new rules inapplicable as against "substantive right", or (b) Erie v. Tomkins with respect to "state created substantive rights".

the part of the building built thereon and as to so much of that suit as sought damages *in personam* for respondents' tortious occupancy. So holding, the Court of Appeals affirmed the District Court's dismissal of the suit for want of indispensable parties.

In thus conceiving that the Federal rules afforded the criterion of indispensability, the Court of Appeals has ruled contrary to the *rationale* of the decision in *McComb* v. *McCormack,* 159 F. 2d 219, in which the Court of Appeals for the Fifth Circuit, *grounding its decision as to indispensability of parties upon State law,* sustained the right of one of plural landowners to sue separately for possession and tortious occupancy of lands.[3] *County of Platte* v. *New Amsterdam Casualty Co.,* 6 F. R. D. 475, although only a District Court case, declares that

> "the indispensability of parties depends upon state law."

Petitioner further maintains that without regard to whether indispensability is to be determined by Federal or State law, the holding by the Court of Appeals that petitioner's suit must be dismissed *in toto,* both as to its claim for possession and as to its claim for monetary damages in which the owners of the other part of the building could have no conceivable legal interest, so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for an exercise of this court's supervision.

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[3] In Lawrence v. Sun Oil Co., 166 F. (2d) 466, the Court of Appeals for the Fifth Circuit, without distinguishing, explaining or overruling McComb v. McCormack, 159 F. (2d) 219, said that federal, not state, law determined indispensability but was at pains to point out that substantive interests were determinable by the law of Louisiana and that the question of joinder in that case would receive the same decision under either State or supposedly Federal law.

The specific complex of the rather intricate facts of this case, although vital to the merits, is not important to the basic question now presented,

> Does State or Federal Law determine the indispensability of parties to a suit for possession of real estate and for damages for its tortious occupation?

Nor is that complex important to the alternative question,

> No matter whether State or Federal law governs, did the Court of Appeals so far depart from historic principles of joinder as to call for certiorari?

Accordingly we here indicate only the nature of the controversy, detailing the facts, which are not in dispute at this juncture of the case, in an appendix to the Brief, *post*, pp. 35 to 40.

In 1924 petitioner owned a lot on Randolph Street in Chicago's Loop (Complt. Par. 9, Tr. 4). John R. Thompson, who is now deceased, separately owned the adjoining lot. Trustees under his will, who stand in his shoes, will be referred to as "the Thompson Trustees".

In that year petitioner and Thompson, each by a separately executed lease in which the other did not join, separately demised the lots in question to United Masonic Temple Corporation (Ex. A, Tr. 50; Ex. Q, Tr. 15). Both leases provided that there should be erected upon the two lots a single building of such construction that upon termination of the lease it could, without too great expense, be transformed into two separate buildings (Ex. A, Tr. 58, Par. Sixth; Ex. Q, Tr. 155). The lease contained explicit and detailed provisions that the building should be "capable of alteration into a separate building • • • along the lot line" (Tr. 59).

The original lessee is now extinct. Its leasehold was assigned to 32 West Randolph Street Building Corporation, which we hereafter call "Randolph" (Ex. B, Tr. 89).

The original lease provided that each lessor might *separately* re-enter his land and his part of the building thereon (Tr. 6, Par. 14 of Complt. Ex. A; Tr. 151, Ex. Q). This agreement was twice reaffirmed by instruments which, though they modified the lease in other particulars, explicitly preserved the right of each lessor separately to enter upon his land and his part of the building therein. (See Tr. references and quotation from the texts of the instruments in Appendix hereto, pp. 35 to 37, *post*).

Petitioner's suit charges that the ground lease has been breached in respects explained in detail in the Appendix, *post*, that the present occupation of petitioner's land and its portion of the building is tortious, and that respondents are liable to the petitioner (1) to turn over to petitioner its land and portion of the building and (2) to pay petitioner monetary damages for tortious occupancy of petitioner's real estate since January 1, 1946 (Complt. Pars. 43, 45, 39, 29).

The clearly applicable Illinois law discussed in the brief, *post*, recognizes that where a single building stands on two or more separately owned tracts of land

> "all questions arising between the parties, in regard to their respective rights in the lot and house, *are to be determined upon the same principles applicable to separate and independent proprietors of adjoining tracts of land.*" (Emphasis supplied). *McConnel* v. *Kibbe*, 43 Ill. 12, cited with approval and followed in *Stevenson* v. *Bachrach*, 172 Ill. 253, both cited and discussed in the Supporting Brief, Point II, *post*.

There is likewise no doubt that the Illinois Ejectment Act permits one of several plural owners of land to sue "to recover the possession thereof, or of some share, interest or portion thereof", without joining other own-

ers. (Ill. Ejectment Act, Secs. 4 and 5, Illinois Rev. Stats. Ch. 45 pars. 4 and 5, p. 211).

With respect to monetary damages recoverable by an *in personam* judgment, there is likewise no doubt that under the Illinois law petitioner could have sued respondents without joining the Thompson interests, since the Thompson interests were not parties to petitioner's lease and can not possibly share in the avails of any recovery. Indeed, until the enactment of the Illinois Civil Practice Act in 1934 (Ill. Stats. Anno., Ch. 110, par. 147, p. 141.) parties claiming rights under separate titles or instruments were *required* to sue separately and not jointly. Joinder of separate but similar claims by separate parties is now permitted but is not required.

Moreover, the leases and their subsequent modifications contractually recognize and confirm the separate rights of each lessor separately to recover possession of his portion of the building and separately to sue for monetary damages in the event of a breach of the lease. (See Appendix hereto, pp. 35 to 37, *post.*)

In short, the Thompson trustees have no title to petitioner's land or to its part of the building and no conceivable interest, legal or practical, direct or indirect, in the monetary damages of which petitioner seeks recovery.

Nevertheless the Court of Appeals, applying its conception of federal and not State law, has held (1) that the Thompson Trustees are indispensable parties, both as to the claim against trespassers for possession and as to the claim for damages, (2) that if joined, they would have to be aligned as plaintiffs, and (3) that therefore the suit must be dismissed *in toto*.

Statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question.

This Court has jurisdiction to review this case under the provisions of Section 1254, United States Judicial Code, which authorizes this Court's review of decisions of Courts of Appeals "By writ of *certiorari* granted upon the petition of any party to any civil • • • case, • • • after rendition of judgment" upon a petition presented "within 90 days after the entry of such judgment" in accordance with the provisions of Section 2101 of the Judicial Code.

The Questions Presented.

The questions presented are:

1. Is the matter of indispensability of parties to an action for the recovery of real estate to be determined as a matter of Federal adjective law, as the Court of Appeals has held, or as a matter of "substantive right" and as essentially a part of petitioner's real estate title under the State law, as petitioner contends?

2. Is the matter of indispensability of parties to a suit for monetary damages for tortious trespass upon and occupancy of real estate to be determined as a matter of Federal adjective law, or as a matter of "substantive right" and as essentially a part of petitioner's real estate title under the State law?

3 Irrespective of whether State or Federal law governs, did the Court of Appeals' holding that the Thompson trustees were indispensable parties, both as to petitioner's claim against trespassers for possession of real estate and as to its claim for dam-

ages for tortious occupancy thereof, so far depart from fundamental principles of joinder of parties as to call for *certiorari* and reversal?

Reasons Relied Upon for the Allowance of the Writ.

The question whether State or Federal law determines the indispensability of parties to actions (1) for possession of real estate and (2) for damages for the wrongful occupancy is an important question of jurisprudence which has not been but should be decided by this Court.

The *rationale* of the Court of Appeals' decision in this case and its earlier decision, cited and followed in this case, in *De Korwin* v. *First National Bank*, 156 F. 2d. 858, is in conflict with the *rationale* of the Fifth Circuit's decision in *McComb* v. *McCormack*, 159 F. 2d. 219, and is probably in conflict with the teachings of this Court's decisions which, while they are not precisely in point, are most nearly applicable. *Guaranty Trust Co.* v. *York*, 326 U. S. 99. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1.

"Renvoi" Considerations.

If, as the Court of Appeals for the Seventh Circuit declares, indispensability is determined in the Federal courts by considerations other than those obtaining in State courts, the following anomaly ensues:

Where a state rule forbids the joinder of parties because such parties' rights are separate and Federal law requires joinder of such parties because their rights are similar, a plaintiff's suit cannot be maintained in either court if joinder of the absent would result in a dismissal of the suit in the State court and their non-joinder would, on removal, result in dismissal in a Federal court. A

plaintiff joining such parties would incur dismissal in the State courts. If he did not join them, he would incur removal and dismissal in the Federal courts.

No such situation is involved in this case. But the decision of the Court of Appeals must be tested by its logical consequences as a principle of decision as well as by its application in the instant case.

The Court of Appeal's holding that the Thompson trustees must be joined, both as to petitioner's claim for possession and as to its claim for monetary damages in which the Thompson trustees have no interest, when the leases in question contractually and therefore substantively affirm and confirm petitioner's right to sue separately, is so far contrary to historic principles of joinder, both State and Federal, as to call for the Court's writ of *certiorari*.

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Respondents.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

The Decisions Below.

The decision below is reported in 170 F. (2d) at page 481. The Court of Appeals' opinion appears in the transcript at pp. 201 to 209. The District Court's judgment appears therein at pp. 175 to 177.

Reference to the Petition, ante, for a Statement of the Grounds on which the Jurisdiction of this Court is Invoked and for a Statement of the Case.

The Petition, *ante*, contains "A Concise Statement of the Grounds On Which the Jurisdiction of this Court is Invoked" and presents, under the heading, "Summary and Short Statement of the Matter Involved", a "con-

cise statement of the case containing all that is material to a consideration of the issues," which are stated under the heading "Questions Presented".

Specification of Assigned Errors Intended to be Urged.

Petitioner has assigned and here specifies the following errors:

1. The Court of Appeals erred in treating the question: Are the Thompson trustees indispensable parties? as a question of Federal law. It should have treated the question as authoritatively ruled by Illinois real property law.

2. The Court of Appeals erred in holding, contrary to the substantive property law of Illinois and contrary to the historic principles of joinder of parties, that the Thompson interests were indispensable parties insofar as the complaint sought termination of the lease and possession of the property.

3. The Court of Appeals erred in holding, contrary to the substantive law of Illinois and contrary to the historic principles of joinder of parties, that the Thompson interests were indispensable parties in so far as the complaint sought damages *in personam* measured by petitioner's lease and modification thereof, to which lease and modifications the Thompson trustees were not parties.

SUMMARY OF ARGUMENT.

I.

The matter of indispensability of parties in an action for real estate or for damages for the wrongful occupation thereof is governed, *first*, by the substantive property and contractual right of the parties involved, and, *second*, by the policy that

> "the outcome of litigation in the Federal courts" shall "be substantially the same, so far as legal rules determine the outcome of litigation if tried in a State court." *Guaranty Trust Co.* v. *York*, 325 U. S. 99.

These considerations demonstrate that, contrary to the view of the Court of Appeals, the question of indispensability of parties in this case should have been governed by State law.

II.

Under Illinois law the separate owners of separate tracts of land, with a single building standing thereon, own such tracts and their respective portions of the building in severalty.

> "All questions between the parties in regard to their respective rights in the lot and house, are to be determined upon the same principles applicable to separate and independent proprietors of adjoining tracts of land." *McConnel* v. *Kibbe*, 43 Ill. 12, cited and followed in *Stevenson* v. *Bachrach*, 172 Ill. 253.

The Illinois Ejectment Act (Ill. Rev. Stats. 1947, Ch. 45, Pars. 4 and 5, p. 1505) specifically authorizes one of

several plural landowners to sue without joining the other owners. Indeed, until recent innovations in Illinois practice introduced by the Illinois Civil Practice Act (Ill. Rev. Stat. Anno. 1947, Ch. 110, Par. 147, p. 141) separate owners of several parcels of land not only need not, but *could* not join in ejectment. This was the law at the time the lease in question was made.

Therefore the Thompson trustees were not indispensable parties to so much of petitioner's suit as sought damages for its separately owned land and that portion of the building standing thereon.

III.

It is clear beyond peradventure that Illinois law has never required, indeed, until the enactment of the provision of the Practice Act above cited, it *did not even permit,* plaintiffs who sued in virtue of separate estates, separate contracts or other separate rights to join as plaintiffs in an action at law for damages, whether the action sounded in contract or in tort. So strict was this rule that owners of separate tracts of land offended by a single nuisance, or owners of separate items of personal property converted by a single transaction of the defendant, not only need not but could not join in a single suit for damages. Since the passage of the Practice Act, joinder in such cases, although permissible, is not mandatory. (See authorities cited and discussed, Point III, *post.*)

Therefore the Thompson trustees were not indispensable parties to so much of the petitioner's suit as sought monetary damages for tortious occupation of petitioner's separately owned real estate.

IV.

The Court of Appeals did not even mention, much less did it discuss or base its decision upon, the contractual provisions in the ground leases contemplating and providing for separate ownership, separate rights of termination, separate rights of re-entry, and physical separation of the legally separately owned portions of the building upon termination of the lease by default or otherwise.

It conceived it to be its duty to assay the total complex of facts and to determine, *as a matter of the judicial discretion of a federal court not constrained by State law,* whether the facts of the case and the relief sought were of such exigency that the joinder of the Thompson interests should be required if joinder was possible and that the suit should be dismissed if it was not possible.

But its proper task and duty was to recognize that under Illinois law petitioner's title was separate and to ascertain whether under Illinois, not federal, law, petitioner might sue respondent without joinder of Thompson trustees. Had it thus addressed itself to this case, it should and probably would have perceived that under Illinois law petitioner's interest was not joint but several. It should thereupon have permitted this suit to proceed without the Thompson trustees.

V.

This case presents an important question as to the demarcation of the boundaries between State and federal law. That question is one which has not been, but should be, decided by this court. There is a conflict

in the *rationale* of the decisions of lower courts upon this important question.

In any event, the Court of Appeals, in holding that the Thompson trustees must be joined in order to recover real estate in which they have no title and damages in which they have no interest, has so far departed from the accepted principles of joinder, State, Federal and general, as to call for this Court's supervision.

We submit that these considerations are of sufficient moment to evoke this Court's writ of *certiorari*.

ARGUMENT.

I.

The Court of Appeals decided the question of indispensability as one of Federal adjective law. It should have decided that question as one of state substantive law.

Under Points II and III, *post*, we demonstrate that under the statutory and decisional law of Illinois petitioner would have had the right to sue respondents for possession of petitioner's land and its portion of the building, or for damages for wrongful occupancy thereof, or for both such possession and such damages without impleading the Thompson trustees. These rights are important elements in petitioner's substantive title to Illinois real property.

But the Court of Appeals cited in this case, not the Illinois statutory provisions and the Illinois decisions relied upon by petitioner, but, *inter alia*, its own former decision in *De Korwin* v. *First National Bank*, 156 F. 2d. 858. In that case it had declared:

> "Notwithstanding defendants' suggestion to the contrary, we think the rule as to indispensability of parties must be determined by federal rather than local rules."

And the Court of Appeals, citing only federal cases, held that the Thompson interests were indispensable.[1]

[1] The Court of Appeals cites Rule 19. But that rule does not enact any criterion of indispensability. Since indispensability depends upon the character of substantive interest involved, it seems clear that the Court of Appeals consulted, not Rule 19, but some supposed *corpus juris federalis* of the sort that is extirpated by **Erie R. R. v. Tomkins**, 304 U.S. 64.

Needless to say, petitioner challenges, not the validity of Rule 19, but the Court of Appeals' application of that Rule in such a way as to deprive petitioner of substantive rights created by State Law and protected by the Enabling Act and the Constitution.

Since the Court of Appeals also held that the Thompson trustees would have to be aligned as plaintiffs, and since the Thompson Trustees are co-citizens of some of the respondents, the result of the Court of Appeals' decision is to frustrate petitioner's right of access to the Federal courts and to remit petitioner to the State courts, *in which petitioner can sue the respondents without joining the Thompson trustees.*

The Court of Appeals for the Fifth Circuit has held, *basing its decision on the law of Texas,* that one of several co-owners of land may sue in the federal courts without joining other co-owners whose presence would destroy diversity and oust jurisdiction. *McComb* v. *McCormack,* 159 F. 2d 219.

There is thus a direct conflict in the *rationale* of the Court of Appeals for the Seventh and for the Fifth Circuits as to whether in actions for possession of land or for damages for the unlawful occupancy thereof, the question of indispensable parties is to be solved by State or by Federal law.[2]

"The intent of *Erie R. R. Co.* v. *Tomkins* [304 U. S. 64]," this court said in *Guaranty Trust Co.* v. *York,* 326 U. S. 99,

> "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of litigation in the federal courts should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in a State court."

[2] In Lawrence v. Sun Oil Co., 166 F. (2d) 466, the Fifth Circuit Court regarded the question of joinder as one of Federal, not State, law but rendered the point academic by finding no conflict between federal and State law. And, unlike the Court of Appeals in the instant case, it consulted as authoritative the substantive real property law of Louisiana in defining and declaring the substantive rights of the parties, upon which substantive rights it said that the question of indispensability depended.

Since Illinois law would permit the present suit without joinder of the Thompson interests, "the intent of *Erie R. R.* v. *Tomkins,*" which was to "insure that • • • the outcome of litigation in the federal courts should be substantially the same • • • as it would be if tried in a State court" has been defeated by the Court of Appeals in the instant case.

In *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, this court said that Congress

> "has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution." (p. 10.)

Defining the scope of the Enabling Act under which the Rules of Civil Procedure have been promulgated, the Court further said in the *Sibbach* case:

> "Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge, nor modify substantive rights', in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. There are other limitations upon the authority to prescribe rules which might have been but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute."

Hence, under the *Sibbach case,* the cardinal question presented may thus be stated: Is the right of an owner of real estate to (a) eject a trespasser and (b) sue him

for damages so inherently and essentially a part of the owner's real estate title, created and recognized by State law, as to be comprised within "substantive rights" recognized by this Court as constitutional in *Erie R. R.* v. *Tomkins,* 304 U. S. 64, and by the Enabling Act of 1934?

In *Cities Service Co.* v. *Dunlap,* 308 U. S. 208, this Court held that in a suit to quiet title to real estate, the matter of "burden of proof" on the issue whether the defendant was or was not a *bona fide* purchaser for value and without notice must be determined by the State, not federal law. Reversing a holding to the contrary by the Court of Appeals, this Court said (at page 212):

> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule. In the absence of evidence showing it was not a *bona fide* purchaser its position was superior to a claimant asserting an equitable interest only. This was a valuable assurance in favor of its title."

Commenting on *Guaranty Trust Co.* v. *York,* this Court said in *Holmberg* v. *Armbrecht,* 327 U. S. 392, that the test as to whether State or federal law governs is not a matter of "the content which abstract analysis may attribute to 'substance' and procedure" but whether the State rule is "significant in enforcing a State created right."

Both the Court's opinion and Mr. Justice Holmes' dissent in *Kuhn* v. *Fairmont Coal Co.,* 215 U.S. 349, are incisively pertinent. In that case, which was decided before *Erie R. R.* v. *Tompkins,* 304 U.S. 64, and before the passage of the Enabling Act, the ultimate question was whether one who had purchased coal rights under the

plaintiff's land was bound, absent specific provisions in the deed, to leave sufficient coal to support the land to which the coal was subjacent. A decision of the Supreme Court of West Virginia, announced "*after* the contract upon which the defendant relies was executed, *after* the injury complained of was sustained and *after* this action was instituted", was decisive of the question so far as the State law was concerned. All of the members of the Court agreed that if the West Virginia law had been settled before the deed was executed, a Federal court, even before *Erie R. R.* v. *Tomkins,* would have been bound to apply the law of the State. A majority of the Court, however, italicizing the word "after" in the language above quoted, held that the Federal courts were not bound to give retrospective effect to the West Virginia decision. But Mr. Justice Holmes, with whom Justices White and McKenna concurred, dissented. Mr. Justice Holmes said, at page 370:

> "This is a question of the title to real estate. It does not matter in what form of action it arises; the decision must be the same in an action of tort that it would be in a writ of right* * *. The title to real estate in general depends upon the statutes and decisions of the State within which it lies. I think it a thing to be regretted if, while in the great mass of cases the state courts finally determine who is the owner of land, how much he owns and what he conveys by his deed, the courts of the United States, when by accident and exception the same question comes before them, do not follow what for all ordinary purposes is the law."

The *Cities Service* case and the *Kuhns* case are applicable here because in the case at bar the ground leases were executed many years after the Illinois decisions hereinafter discussed.

"Legal title" to real estate is no more than a concept that subsumes the right to vindicate the beneficial interests in land that collectively constitute "ownership". Basic indeed is the right to recover, by process of law which has superseded self-help since Norman times, possession of lands. Hardly less basic is the right to recover money, whether by way of damages for tortious occupancy or by way of rent, for the possession of lands by another.

The decision of the Court of Appeals, which declares that the Thompson trustees must be joined as plaintiffs but cannot be joined because joinder would destroy jurisdictionally requisite diversity, denies to petitioner the right to vindicate in the federal courts its rights *in rem* and *in personam*.

II.

Under Illinois Law, as well as under federal decisions and general authority, petitioner's suit for possession of its own land and its part of the building thereon could have been maintained without joinder of the Thompson interests.

Two Illinois cases, *McConnel* v. *Kibbe*, 43 Ill. 12, and *Stevenson* v. *Bachrach*, 172 Ill. 253, make it clear that adjoining owners of land and of separate parts of a single building hold their separate parts in severalty.

In the first of these cases, *McConnel* v. *Kibbe*, 43 Ill. 12, one of the parties owned the ground floor of the building, the other party owning the upper portion of the building. There were covenants as to support of the upper portion of the building.

The owner of the upper part of the building brought a suit to have the entire building sold as upon a partition and the proceeds divided.

The Supreme Court of Illinois, although it recognized that the "condition of the property" was "anomalous, and causing much irritation and litigation between the parties", nevertheless declared:

> "Portions of the premises particularly described belong in severalty to each of these parties, and no portion of it jointly to both".

The court sustained the defendant's contention that

> "• • • all questions arising between the parties, in regard to their respective rights in the lot and house, *are to be determined upon the same principles applicable to seperate and independent proprietors of adjoining tracts of land.*" (Emphasis supplied.)

In *Stevenson* v. *Bachrach,* 170 Ill. 253, the plaintiff and the defendant owned, respectively, different parts of the same single building erected upon their separately owned tracts of land. The court, citing, approving, and following *McConnel* v. *Kibbe,* discussed above, held that each party owned in severalty his part of the building and the land upon which it stood. Thus there is no doubt under Illinois law that in the instant case petitioner owns its land and its portion of the building in severalty and not in common or jointly with the Thompson interests.

The first of the two cases cited above was decided in 1867 and the second of them was decided in 1897. In 1924, therefore, when the instant lease was made, this law was well settled.

But the parties, not content merely to rely upon this familiar and well established principle of the common law, *contractually* agreed that each should have the right separately to re-enter his separately owned land and its portion of the building thereon. (See *Appendix, post,* for more detailed discussion of and quotation from these explicit agreements.)

This agreement was embodied in the original lease, confirmed in 1935 by an instrument which modified the lease in other respects but not in this one, and again confirmed in 1939, when the ground lease was again modified in other respects. (*Appendix, post,* pp. 35 to 37.)

Petitioner therefore maintains that its separate right of ownership of land and of its part of the building thereon, with the corollary right separately to recover its portion of the premises, is a substantive right both because it is inherent in its estate in severalty and because it has been embodied in a contract.

Sections 4 and 5 of the Illinois Ejectment Act recognize the right of one of several owners of land to sue for "his share" thereof without joining his fellow owners:

> "Sec. 4. *Interest Required to Maintain Action.*
>
> "No person shall recover in ejectment unless he has at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, *or of some share, interest or portion thereof,* to be proved and established at the trial.
>
> Sec. 5. *Joint Tenants, etc., Joint or Several Suits.*
>
> "Any two or more persons claiming the same premises as joint tenants, tenants in common or co-parceners, may join in a suit for the recovery thereof, *or any one may sue alone for his share.*" (Emphasis supplied).

If, as these provisions enact, one of several "tenants in common or joint tenants, or co-parceners" can sue without joining his co-tenants, *a fortiori* one whose interest is separate, several and distinct may so sue.

The Court of Appeals, in the opinion below, gave no consideration to the Illinois law developed under this

Point. Therefore the Court of Appeals denied to petitioner a right guaranteed to it by the Constitution of the United States (*Erie R. R.* v. *Tomkins,* 304 U. S. 64) and confirmed by the Enabling Act under which the Federal Rules of Civil Procedure have been promulgated. (See Point I, *ante*).

But without regard to whether the Court of Appeals should have conceived the question of joinder in terms of Illinois law or of Federal law, its decision is wrong.

In *Willard* v. *Tayloe,* 75 U. S. 557, the Supreme Court of the United States held that a plaintiff, asserting in equity a claim of right to lands against one in possession, need not join his brother, to whom he had assigned one-half of the rents.

In *Davis* v. *Coblens,* 174 U.S. 719, this Court recognized that in ejectment the practice is to permit one of several owners of a tract of land "to sue either jointly or severally as they may elect." The several courts of appeals have often held that one of several owners of land may sue for possession without joining his co-owners.[1] In dismissing petitioner's suit for possession the Court of Appeals not only disregarded petitioner's substantive rights under Illinois law but so far departed from the historic principles of joinder as to call for this court's writ of *certiorari.*

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[1] In each of the following cases it was held that one or less than all of the plural owners of a tract of land might sue for possession thereof in a suit in the nature of an action of ejectment:

Chidester v. City of Newark (3rd Circ.), 162 F (2d) 598.
McComb v. McCormack, 159 F (2d) 219.
Whittle v. Artis, 55 Fed. 919.
Rose v. Saunders, 69 F. (2d) 339.

III.

The complaint stated a cause of action for monetary damages which, both by the Illinois law and on general principles, was justiciable in the absence of the Thompson trustees.

The Illinois Civil Practice Act contains permissive, not mandatory, provisions which allow but do not compel "all persons" to "join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative" (Ill. Stats. Ann., Ch. 110, Par. 147, p. 141). Under this statute doubtless petitioner and the Thompson trustees could, if they so chose, join in a single action in the State courts. But nothing in this statute requires such joinder if it were not required at common law.

There is no doubt whatever that under the common law of Illinois, parties asserting claims in virtue of separate titles, separate contracts or other separate bases of legal right not only need not but *could not* join in a single action at law. This was so even though their rights were similar and arose out of a single transaction or series of transactions. Authorities making this clear are cited in the margin.[1]

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[1] Several inhabitants of a neighborhood could not sue jointly for the annoyance caused by a single nuisance although each plaintiff complained of identical acts. **Lindblom v. Purity Ice Co.**, 217 Ill. App. 306.

So strict was the rule that where a defendant seized luggage containing articles of apparel, some of which belonged to the husband and some of which belonged to the wife, the suit was dismissed on the sole ground of misjoinder. **Mitchell v. Helsen**, 169 Ill. App. 531.

In **Moore v. Terhune**, 161 Ill. App. 155, the plaintiffs laborers were employed by separate contracts "to plaster a house for plaintiff in error." They joined in a single action for their wages, which they claimed upon similar contracts. The court reversed a judgment for the plaintiff for misjoinder. The court said, at page 156:

But suppose that the question were not one of Illinois law. We do not multiply citations sustaining the inveterate principle of common law that parties claiming under separate titles, under separate contracts, or otherwise by virtue of several interests not only might but *must* sue separately. We quote, not as authoritative, but simply as a compendious statement of well-settled principles long familiar to this court, the following text from Corpus Juris, Vol. 47, "Parties", p. 54.

"Sec. 109 b. At Common law—(1) In General.

"Each person injured must, at common law, sue separately where the damages, as well as the interest, are several; hence, different persons who have distinct and separate claims, although they stand in the same relative situation, or whose legal interests are several, if there is no express contract with them jointly, must sue severally."

"It is elementary that an action at law can only be maintained by the party or parties in whom the legal title exists, and no party should be joined as plaintiff who has not a joint interest with the other plaintiffs in the subject of litigation in actions ex contractu. Dix v. Mercantile Ins. Co., 22 Ill. 272; Frye v. Bank of Ill., 5 Gilm. 332."

In Starrett v. Gault, 165 Ill. 99, the Illinois Supreme Court, authoritatively expounding Illinois substantive law of contracts, as well as that State's adjective law, considered a case where a client had, by separate contracts, employed each of two attorneys who were not partners to represent her in litigation. The two attorneys joined in a single action to recover their fees for services rendered in joint cooperation. They recovered a judgment in the trial court. The Supreme Court of Illinois reversed, holding that the two lawyers, far from being required to join, were not even permitted to do so.

Prior to the advent of the Illinois Civil Practice Act in 1934 the classical exposition of Illinois procedure in actions at law was Puterbaugh's Common Law Pleading. This text was to the Illinois practitioner in its authority, if not in its merits as a synthesis and critique of common law jurisprudence, what Blackstone and Kent were to the eighteenth century lawyer. Puterbaugh thus states the Illinois rule as of 1926 (Section 17, p. 11):

"Where the interests are several there can, as a rule, be no joinder, even where the rights of the plaintiffs have been violated by one and the same wrongful act on the part of the defendant."

This Court held in *Hall* v. *Leigh*, 8 Cranch, 50, 12 U. S. 50, that where each of two owners contributed from his separate property a moiety of grain, though the grain was shipped in a single consignment to the purchasers, each owner might sue separately since their contract provided that defendants purchased separately from each of the plaintiffs. This Court, speaking of the defendants, said at p. 22:

> "By their own conduct they have precluded themselves from every objection of this nature, for they have contracted, as to the one half of this property with the plaintiff, and as to the other moiety, with William Potts & Co., and it will be seen by a recurrence to the testimony, not only that their engagements with these parties are distinct, but of different kinds."

The right to recover damages for the tortious occupancy of petitioner's land and its portion of the building is an essential part of petitioner's legal title. Under Illinois law, Thompson had no legal interest in that right. He was not an indispensable party to a suit seeking this enforcement.

The Court of Appeals should have consulted and applied the law of Illinois, not its own conception of federal jurisprudence, and should not have held that the Thompson trustees were indispensable. Without regard to whether the question is one of State, federal or "general" law, the Court of Appeals' decision so far departed from the accepted principles of law as to call for this courts' writ of *certiorari*.

IV.

The opinion of the Court of Appeals misconceived the applicable principles of joinder of parties because it ignored Illinois law as affording the criterion of indispensability.

The opinion of the Court of Appeals makes it clear that that Court conceived it to be its duty to assay the total complex of facts and to determine, *as a matter of the judicial discretion of a federal court not constrained by State law,* whether the facts of the case and the relief sought were of such exigency that the joinder of the Thompson interests should be required if joinder was possible and that the suit should be dismissed if it was not possible.

The Court of Appeals did not even mention, much less did it discuss or predicate its decision upon, the provisions of the ground leases or the amendments thereto by which the rights of petitioner separately to terminate its lease in the event of default, separately to recover its land and the portion of the building situated thereon, and separately to recover its monetary damages were explicitly declared. (*Appendix,* pp. 35 to 37, *post.*)

Petitioner maintains that it was not the task of the District Court and the Court of Appeals to determine whether in the discretion of those courts the parties should be remitted to the State courts because the Thompson trustees could not be joined in the Federal courts. Rather the lower courts' duty was to recognize that under the Illinois law petitioner's title was separate and to ascertain whether under Illinois law petitioner might therefore sue respondents without joinder of the Thompson trustees. Had the Court thus addressed itself

to this case, it would have perceived that under Illinois law petitioner's interest was *not* joint, but several. It should thereupon have permitted this suit to proceed without the Thompson trustees.

But if the Court of Appeals' opinion may be read as intimating (it does not expressly declare) that petitioner's rights, either with respect to the whole of the building or with respect to the theatre portion of the building, were in some manner fused or merged so as to render petitioner and the Thompson trustees co-owners or co-lessors of the whole of the building or of the theatre, either of two responses to that suggestion would, we submit, be conclusive:

In the *first* place, it is demonstrated in the Appendix, *post,* that petitioner and the Thompson trustees, each respectively, explicitly disavowed any intention of becoming a co-lessor of the other with respect to the premises or any part thereof. Indeed, in 1940, the Thompson trustees wrote a letter similar to a letter written on November 10, 1938, by petitioner, except that Thompson's letter was even stronger in its disclaimer of any intention to become in any way a lessor under the theatre lease, expressly and emphatically providing that nothing should be construed so as to constitute Thompson a lessor under the theatre lease and asserting their separate and several right in their land and that portion of the building standing thereon. (See *Appendix,* pp. 35 to 37 and 40, *post.*)

But in the *second* place, even if petitioner and the Thompson trustees were to be treated for the purpose of this litigation as co-owners of the land and building as an entirety or as co-lessors of the theatre, instead of separate owners of separate tracts and of the portions

of the building, respectively, standing upon such separate tracts, the authorities cited under Point II, *ante*, demonstrate that neither would be an indispensable party to a suit brought by the other for possession of the premises. And no matter what mutual, reciprocal, or even joint interests might be imputed to petitioner and the Thompson trustees with respect to the entire land and building, the authorities cited under Point III, *ante*, demonstrate that inasmuch as the Thompson trustees would have no conceivable interest in damages measured by petitioner's separate lease and payable to petitioner severally, they could not be indispensable parties to a suit brought for the recovery of such damages.

The Court of Appeals, after stating that there is no dispute as to the facts, ignores entirely the fact, *controlling* under Illinois property law, that petitioner and the Thompson trustees *contractually agreed and engaged* that petitioner, as well as Thompson and his trustees, should have the right separately to terminate their separate leases, separably to regain their separate lands and portions of the building, and separately to recover damages for tortious occupation.

The parties were mature, sophisticated business men. They contemplated whatever anomaly there is in separate ownership of separable parts of an integrated building and nevertheless contracted for rights of separate termination, separate re-entry and separate monetary recovery. *McConnel* v. *Kibbe*, 43 Ill. 12, and *Stevenson* v. *Bachrach*, 170 Ill. 253, both discussed under Point II, *ante*, recognize the validity of agreements such as this one.

The decision of the Court of Appeals therefore deprived petitioner of property and contractual rights preserved to it by the Enabling Act and denied rights which,

arising under State law, are guaranteed by the Constitution of the United States.

V.

If petitioner's complaint would have supported a judgment for any relief, at law or in equity, in the absence of its Thompson interest, it was error to dismiss it for want of jurisdiction.

The proposition stated above, although vital to this case, is axiomatic. It is sustained by the authorities cited in the margin.[1] We do not labor it.

Under Points II and III, *ante,* we demonstrate that this complaint pleaded facts constituting a common law action for possession (Point II) and for *in personam* damages (Point III) in which the Thompson trustees had no legal interest—indeed, in which they not only need not join with petitioner, but until recent innovations in State and Federal practice *could not* have joined with it, at least in an action at law; for several creditors, holding separate claims due upon separate contracts or arising out of wrongful acts with respect to separate tracts of land, could never have joined in an action at law until modern changes in Federal and State practice even though the claims were similar.

It is immaterial whether the complaint was entitled an action of ejectment, an action of trespass, or a complaint in equity. It was error to dismiss it for want of indispensable parties when its averments, if proved or admitted, would have supported any relief.

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[1] "The motion" (to dismiss for want of jurisdiction) "should not be granted if the Complaint states any cause of action against the defendants whether at law or in equity." **Hughes Federal Practice,** Section 18,564. **Chappel v. First Trust Co.,** 30 F. Sup. 763, although only a District Court case, discusses and treats this axiom of State Code pleading under the new Rules of Federal Procedure.

VI.

This Case is of Sufficient Importance to Elicit this Court's Writ of Certiorari.

We are mindful that "review on writ of *certiorari* is not a matter or right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". (*This Court's Rule 38.*) We therefore deem it proper to suggest those considerations which we think should prevail upon the Court to grant *certiorari* in this case.

This Court has never decided whether State or Federal law determines the indispensability of parties to a suit for the recovery of real estate or for damages for the wrongful occupancy thereof. The question is one of moment in the demarcation of the boundaries between State and Federal law.

The Court of Appeals for the Seventh Circuit regards the question of indispensability of parties as one of Federal law. The Court of Appeals for the Fifth Circuit has viewed this question as determinable by the law of the State.

Thus this case presents an important question which has not been, but should be, settled by this Court and with respect to which opinions from the Courts of Appeals of at least two circuits are in disagreement.

Wholly apart from this important question, the Court of Appeals, in holding that the Thompson trustees must be joined even though they have no title to petitioner's portion of the building and no possible interest in its claim to monetary damages, so far departs from accepted principles of judicature as to call for this Court's writ of *certiorari*.

CONCLUSION.

For the reasons suggested in the foregoing Petition and urged in this Supporting Brief, it is respectfully submitted that this Court should grant its writ of *certiorari* to review and reverse the decision of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX.

On April 1, 1924, petitioner owned a tract of land on Randolph Street in Chicago's loop (Tr. 4, Par. 7). John R. Thompson, now deceased, separately owned an adjoining tract of land (Tr. 151; Ex. Q). Thompson's personal representatives, who stand in his shoes, will for simplicity be called "Thompson".

On that day petitioner demised its tract to a now extinct corporation, United Masonic Temple Corporation, for a term of 77 years (Ex. A; Tr. 50). By a separately executed, but similar lease, Thompson similarly demised his separately owned tract to the same lessee (Ex. Q; Tr. 151).

Each lease required that United should erect upon the two separate but adjacent tracts a building which, though it was to be structurally and functionally integrated, nevertheless was to be so constructed that any time thereafter it could be transformed into two separate buildings on the properties of the two lessors, respectively, without too great expense. Such a building was erected and is now standing (Ex. A, Tr. 58, Par. Sixth; E. Q, Tr. 155). Language in petitioner's 1924 ground lease, identical with corresponding language in the Thompson lease, is quoted in the margin.[1]

[1] Section 12 of the 1924 Metropolis ground lease (Exh. A, Tr. 76) is as follows:

"Twelfth. Said Lessee further covenants and agrees to and with said Lessor that if default shall at any time be made by said Lessee or its assigns in the payment of the rent or any installment or part thereof at the time when the same shall be due and payable to the said Lessor as herein provided, and such default shall continue for a period of ninety (90) days after notice thereof in writing to the said Lessee, or if default shall be made in any of the other covenants herein contained to be kept, observed and per-

In 1935 the respondent, 32 West Randolph Street Corporation, which we hereafter call "Randolph", became the successor lessee under each of these two leases by a single document executed by Randolph and the two lessors (Ex. B, Tr. 89). This instrument explicitly, meticulously and unambiguously affirmed and preserved the separate ownership by each lessee, respectively, of its or his tract of land and so much of the building as stood thereon (Ex. B, j, Tr. 94).

This instrument was deliberately executed by each of the two lessors in full contemplation and recognition of the practical implications of separate ownership of separate parts of the same building and represented their deliberately conceived intention to preserve (1) the separate character of their reversionary estates, (2) their separate rights to terminate their respective leases separately for specified defaults, and (3) their separate rights, upon termination, separately to re-enter their respective portions of the building.

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formed by the Lessee or its successors or assigns, and such default shall continue ninety (90) days after notice thereof in writing to the said Lessee, it shall and may be lawful for the Lessor at its election to declare the said term ended and the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said Lessee and every other person occupying or being in or upon the same to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in its first and former estate.

The said Lessee hereby waives any demand for the possession of said premises in the event of the forfeiture of this lease, * * *."

The 1924 Thompson ground lease contains the same provision (Exh. Q, Tr. 155, last paragraph).

Section Nineteenth of the Metropolis 1924 Lease (Exh. A, Tr. 81) provides:

"Nineteenth. The said Lessee further covenants and agrees to and with the said Lessor that upon the termination of this lease by forfeiture or lapse of time that the said Lessee will at once surrender and deliver forthwith to the Lessor the above described premises together with all of the improvements thereon and that all the buildings, fixtures and improvements then standing upon the said demised premises and all securities or sums of money held by the Lessor or by any trustee for the benefit of the said Lessor shall belong to the said Lessor and that no compensation shall be allowed or paid therefor, except as hereinafter set forth."

The same clause is in the Thompson 1924 Lease (Exh. Q, Tr. 156).

In 1939 the then lessee, Randolph, being heavily in default to each lessor, the two lessors separately executed amendments to their 1924 leases whereby they forgave all past defaults and again preserved explicitly and emphatically their separate real estate interests and their separate rights to recover possession of their respective lands and the separable part of the building thereon in case of specified future defaults (Ex. C, Section 13, Tr. 110; Ex. Q, Tr. 155).

The recitals in these amendments expressly recognized the practical problem then existing of the two lessors as to whether they should for the future fuse their respective rights, including the right to regain possession of their respective properties, or, on the other hand, should preserve them separately or in the future as they had since 1924 (Ex. C, Tr. 97; Ex. Q, Tr. 155). Their decision in 1939 to preserve their real estate rights separately, including the right separately to regain possession of their separate properties, was reflected by express provisions in each of the separate amendments (Ex. C, Tr. 97; Ex. J, Tr. 155). Language from the 1939 Metropolis Amendment to the ground lease, identical with corresponding language in the Thompson Amendment to its separate lease, is quoted in the margin.[2]

Thus, from 1924 to the present time, the separate leases of the two lessors have contained provisions, twice

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[2] The 1939 Metropolis amendment to the 1924 Metropolis ground lease provides (Exh. C, Tr. 98):

"Now, Therefore, in consideration of the premises and in further consideration of the simultaneous execution and delivery by Thompson Estate to Randolph of an instrument of amendment, alteration, and modification as aforementioned, Metropolis Theatre Company hereby agrees with Randolph that * * *."

"Section 13. Except to the extent expressly and specifically modified herein, all of the terms, covenants, conditions, and provisions of said Metropolis sublease shall remain in full force and effect." (Tr. 110)

The 1939 Thompson amendment contains the same provision (Exh. R, Tr. 169).

explicitly reaffirmed, preserving the rights of the two lessors separately from each other and affirming the right of each lessor separately to terminate his lease in case of specified defaults.

On December 8, 1945, the respondents Barkhausen and Boren, doing business as the partnership of Doubleby & Co., induced the lessee of the petitioner and of Thompson to execute an assignment, in violation of the express covenants of the two leases, of Randolph's lessee interest in each of the 1924 leases as amended in 1939, to said Barkhausen and Boren's nominee, Brash, another respondent herein (Compl. Par. 30, Tr. 10; see Ex M-1, Tr. 134). The actual assignments were dated January 29, 1946 (Ex. E, Tr. 115; Ex. F-1, Tr. 118; Ex. F-2, Tr. 118).

On that day Randolph (lessee of petitioner and Thompson) delivered possession of the premises demised by each lease, including the large building thereon, to Brash, the nominee of Barkhausen and Boren. Since January 29, 1946, the respondents, Barkhausen and Boren, have been in possession of the operation (through their nominee) of this large building and have received all of the profits and income of the building up to the present time (Complt. Pars. 51, 52, 53, 54, 43, 5, 34).

On December 8, 1945, petitioner's lessee, Randolph, executed a purported assignment of the lease of a theatre (which is part of the building) to the respondent corporation, Oriental Entertainment Company, which had been organized for that purpose by Barkhausen and Boren (Ex. D, Tr. 112; Complt. Pars. 37, 40, 41). This was done notwithstanding the fact that the theatre lease which was thus assigned on December 8, 1945, had been legally extinct since February 25, 1941, when the sub-

lessee under it had abandoned possession of the theatre to Randolph's nominee and at Randolph's direction executed the assignment of the sub-lease dated February 25, 1941 and accepted the possession of the theatre (Complt. Pars. 23, 25, 26).

It is pursuant to this purported assignment dated December 8, 1945 of the theatre sub-lease that the respondent Oriental Entertainment Corporation has had possession since December 8, 1945 of the theatre and has received all of the profits from the operation of the theatre (Complt. Pars. 37, 40, 41).

Respondents have, since December 8, 1945, tendered to petitioners and Thompson "as rent" moneys in purported conformity with the extinct theatre lease and in purported compliance with the provisions of the ground leases (Complt. Par. 51, Tr. 15). Petitioner and Thompson have separately and consistently in each instance refused to accept any rents from any of the respondents, taking the legal position that all of said purported assignments were invalid, that they constituted breaches of the lease and worked a defeasance of the lessees' tenure, and that the said respondents held possession of the separate property of the petitioner and Thompson as trespassers (Complt. Pars. 48, 49, 50, 51, Tr. 14 and 15).

Hence, for the past three years these trespassers have been receiving all of the profits and income of both the building and the theatre portion of the building; and neither petitioner nor Thompson has received any part thereof, nor any rent therefor (Complt. Par. 48, Tr. 14).

On November 10, 1938, petitioner entered into a letter-agreement with Southern (the then lessee under the Theatre lease) agreeing to recognize the tenancy of South ern (1) if Randolph's lease should be terminated for

Randolph's default, and (2) so long as Southern was not in default (Ex. K, Tr. 131).

In 1940, the Thompson trustees (the absent parties whose supposed indispensability is now asserted) entered into a similar letter-agreement with Southern, with similar conditions as described above in Petitioner's agreement with Southern. Thompson's letter expressly and emphatically provided that nothing therein contained should be construed so as to constitute Thompson a lessor under the theatre lease, and that Thompson should not be required to perform any of the obligations or duties of the theatre lease (Ex. S, Tr. 169).

Here again, the Thompson trustees' letter was so drafted as to preserve the Thompson legal rights and interest in their own property separate from those of petitioner; and of course so was petitioner's letter.

The complaint alleges that the theatre lease became legally extinct on February 25, 1941, as a result of Southern's abandonment of the theatre to its lessor, while heavily in default in its rent obligations (Complt. Par. 23, Tr. 8).

The agreements expressed in these two letters "died" with the end of Southern's tenancy in February 25, 1941.

Accordingly the complaint of the petitioner sought to recover possession of petitioner's land and that portion of the building on its parcel of land and to recover damages against various respondents who participated in inducing the petitioner to breach the covenants of petitioner's lease of 1924 as amended in 1939 (Complt. Par. 59, Tr. 17).

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